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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Plaintiff,

v.

CREDIT SUISSE SECURITIES (USA) LLC, et al.,

Defendants.

No. CV-10-3045 SC

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Date: January 7, 2011
Time: 10:00 a.m.
Dept. Courtroom 1, 17th Floor

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 7, 2011, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the above-captioned Court, located at 450 Golden Gate Avenue, in San Francisco, California, Plaintiff, Federal Home Loan Bank of San Francisco, will and hereby does move the Court for an order pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to amend Plaintiff's First Amended Complaint in this action. This motion for leave to file Plaintiff's Second Amended Complaint is based on this notice of motion and motion, the memorandum of points and authorities in support thereof, the attached declaration of Anne Hayes Hartman, the pleadings and record in this action, and such other evidence and argument as may be presented at the hearing on this matter.

Dated: November 5, 2010

GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY, LLP

GRAIS & ELLSWORTH LLP

By: /s/ Robert A. Goodin
Robert A. Goodin
Attorneys for Plaintiff
Federal Home Loan Bank of San Francisco

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POINTS AND AUTHORITIES

I. INTRODUCTION

Through this motion, the Federal Home Loan Bank of San Francisco (the Bank) respectfully seeks leave, pursuant to Federal Rule of Civil Procedure 15(a), to file its proposed Second Amended Complaint, together with the Schedules thereto, submitted herewith as Exhibit A to the declaration of A. Hartman (Hartman Dec.). The Bank's proposed amendment alleges common law successor liability against Bank of America Corporation (BAC) and unknown subsidiaries thereof (BAC Does 1-10). The proposed amendment also alleges control person liability under Section 15 of the Securities Act of 1933 and Section 25504 of the California Corporations Code against Countrywide Financial Corporation (CFC). Because the Bank's proposed amendment is timely and in good faith, does not prejudice any defendant, and is not futile, it should be permitted.

II. STATEMENT OF FACTS

A. Procedural History

The Bank commenced this action by filing a complaint in San Francisco Superior Court on March 15, 2010. (Hartman Dec. ¶ 2.) That complaint was not formally served on any defendant. (*Id*.) On June 10, 2010, prior to any defendant appearing or responding to the original complaint, the Bank filed its First Amended Complaint, and subsequently served it on all defendants named therein, (*Id*.) including but not limited to Banc of America Securities, LLC; Banc of America Funding Corporation; Banc of America Mortgage Securities, Inc.; Countrywide Securities Corporation; CWALT, Inc.; and CFC.[1] (Hartman Dec. ¶ 3.) These six Bank of America entities and Countrywide entities have been represented jointly by the same law firm, Morrison & Foerster, LLP, in this action. (*Id*.)

On July 12, 2010, defendants removed the action to this Court. On July 29, 2010, upon stipulation of the parties, the Court issued a Related Case Order finding this case to be related to *Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc., et al.*,

[1] CFC was alleged, *inter alia*, to have control person liability with respect to CWALT, Inc. (First Amended Complaint ¶ 23.)

Case No. 10-CV-3039 SC (the Deutsche Case). On August 11, 2010, the Bank filed a motion to remand this action and the Deutsche Case to San Francisco Superior Court. That motion has been fully briefed, and the Court has indicated that it intends to issue an order without oral argument.

No case management conference has been held in this matter, and no case management order has been issued. The parties have stipulated that the case management conference will proceed following a ruling on the motion to remand. (Hartman Dec. ¶ 4.) No defendant has responded to the First Amended Complaint. The parties have stipulated that defendants will respond following the Court's ruling on the motion to remand, and the Bank understands that defendants will move to dismiss the action. (Hartman Dec. ¶ 5.) No disclosures pursuant to Rule 26 have occurred, and no discovery has been conducted. (*Id.*)

The Bank asked counsel for the six currently-named Bank of America and Countrywide defendants for consent to this proposed amendment but had not received consent by the time of this filing. (Hartman Dec. ¶ 6.)

B. Nature of Proposed Amendment

The Bank's proposed amendment adds allegations against as yet unnamed defendants: BAC, the public holding company for a group of Bank of America companies, and presently unknown BAC subsidiaries, BAC Does 1-10. (*See* Proposed Second Amended Complaint ¶¶ 23 and 27; *see also* Hartman Dec. ¶ 8 and Exh. B thereto (redline copy).) The proposed amendment alleges that CFC violated Section 15 of the Securities Act of 1933 and Section 25504 of the California Corporations Code by its direct or indirect control of defendant Countrywide Securities Corporation. (*See id.* ¶¶ 25-26 & 178.) Thus, CFC is liable to the Bank jointly and severally with, and to the same extent as, Countrywide Securities Corporation. (*See id.*) The proposed amendment further alleges that BAC and BAC Does 1-10, as a result of the Bank of America-Countrywide merger and subsequent asset purchases, are the successors-in-interest to the liabilities of CFC. (*See id.* ¶¶ 127-150.) As a result, BAC and BAC Does 1-10 are liable to the Bank to the same extent as CFC and Countrywide Securities Corporation, which CFC controlled.

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III. LEGAL ARGUMENT

Leave to amend a complaint should be freely granted under Federal Rule of Civil Procedure 15(a)(2), and this policy is to be applied with "extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003); *see also Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (noting that inferences should be drawn "in favor of granting the motion"). This extraordinary liberty is mandated because a plaintiff should be given the opportunity to "test his claim on the merits" when the underlying facts or circumstances may form the proper basis for relief. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Indeed, the burden is on the defendants to convince the Court that "justice" requires the denial of leave to amend the complaint. *California ex rel. Mueller v. Walgreen Corp.*, 175 F.R.D. 631, 637 (N.D. Cal. 1997).

The Ninth Circuit weighs four factors when considering a Rule 15(a) motion to amend: (1) bad faith in bringing the motion; (2) undue delay; (3) prejudice to the opposing party; and (4) futility of the proposed amendment. *Griggs*,170 F.3d at 880-81. Prejudice to the opposing party is the factor that carries the greatest weight in determining whether leave to amend should be granted. *Eminence Capital*, 316 F.3d at 1052. Absent prejudice or a strong showing by the party opposing the amendment of any of the remaining factors, "there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Id.* (emphasis in original). In this case, each of these factors favors granting the Bank leave to amend.

A. The Bank Acted in Good Faith and Without Undue Delay

Less than five months have passed since the defendants were served with the operative complaint. The Bank seeks, in good faith, to add detailed factual allegations that support a theory of successor liability. These allegations are the product of a comprehensive and time-consuming analysis of the defendants' financial statements, annual reports, press releases, and other publicly available information. The timing of the Bank's proposed amendment is reasonable, particularly in light of the ongoing turmoil in the mortgage loan industry and the dynamic corporate relationships among the defendants.

B. Defendants Will Suffer No Prejudice by the Proposed Amendment

Prejudice may occur when the additional proposed claims or parties increase the scope and complexity of the litigation or when amendment requires the reopening of discovery and thus imposes significant additional expense and delay in resolving the dispute. *In re Fritz Cos. Secs. Litig.*, 282 F. Supp.2d 1105, 1109 (N.D. Cal. 2003). Defendants bear the burden of establishing such prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987).

Given the early stage of this litigation, defendants cannot establish prejudice sufficient to deny the Bank's motion. Defendants have not yet responded to the complaint, and discovery has not commenced. The proposed new defendants (BAC and BAC Does 1-10), as successors-in-interest to CFC, have been on notice of the underlying causes of action against their predecessor since this lawsuit began. Furthermore, several other BAC subsidiaries already are named as defendants in this lawsuit. For all of these reasons, defendants will not be unduly prejudiced by the proposed amendment.

C. The Proposed Amendment is not Futile

In its proposed amendment, the Bank alleges that BAC and BAC Does 1-10 are the successors-in-interest to CFC as a result of Countrywide's merger with, and subsequent sale of assets to, Bank of America. (*See* Proposed Second Amended Complaint ¶¶ 127-150.) The allegations in the proposed amendment state a cognizable claim for successor liability, which the Bank should be permitted to test on the merits. Thus, the futility doctrine does not bar the Bank's proposed amendment.

"A court usually invokes futility to deny an amendment that adds a new cause of action having *no hope* of surviving a subsequent motion to dismiss." *Local 144 v. CNH Mgmt. Assoc., Inc.*, 713 F. Supp. 680, 693 (S.D.N.Y. 1989) (emphasis added) (citing *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571 (9th Cir. 1984)). The Bank's successor liability allegations not only have "hope" of surviving a motion to dismiss, they likely will survive. Indeed, another plaintiff recently made similar factual allegations in asserting successor liability against BAC, and successfully survived a motion to dismiss. *See* Order Denying Mot. to Dismiss, *MBIA v. Countrywide, Inc.*, No. 08-602825, at 11-15 (N.Y. Sup. Ct. filed April 27, 2010). (Hartman Dec. ¶ 9 and Exh. C thereto.) Accordingly, the Bank's proposed amendment is not futile and should be permitted.

IV. CONCLUSION

For the foregoing reasons, the Bank respectfully requests that it be granted leave to file its proposed Second Amended Complaint.

Dated: November 5, 2010

GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY, LLP

GRAIS & ELLSWORTH LLP

By: /s/ Robert A. Goodin
Robert A. Goodin
Attorneys for Plaintiff
Federal Home Loan Bank of San Francisco

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